United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

74-1698

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1698

UNITED STATES OF AMERICA,

Appellee,

—v.—

WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN D. GORDAN, III,
Assistant United States Attorney, Of Counsel.

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Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *in banc,* of the decision by a panel of this Court (Oakes, *C.J.*, and Frankel and Kelleher, *D.JJ.*), filed October 8, 1974, reversing the conviction of Wilson Torres for conspiracy to distribute narcotics, 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 846, and remanding for a new trial.

Reasons for this Petition

The Court reversed the conviction because of "the cumulative effect of three errors", slip op. at 5625, it found in the conduct of the proceedings below: "Error lay in asking Ortiz if he had said that Torres was a narcotics

courier, in using Assistant United States Attorney Hemley as a witness and in characterizing Torres as 'the guy who sold heroin' in summation." Slip op. at 5626. For the reasons that follow, the Government respectfully submits that the first and third grounds given for reversal are wholly without foundation and that the second, while correctly identifying an error which *may* have occurred at trial, is insufficient to require reversal.

This appeal does not involve an especially significant crime or important defendant. It is ". . . a narcotics case with a factual outline and charges familiar to all who regularly read . . ." the opinions of this Court. *United States* v. *Rosa*, 493 F.2d 1191, 1192 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3210 (October 15, 1974). The issues involved here are not of constitutional dimension or national importance. What makes this simple case worthy of *in banc* consideration is that a panel of this Court has disposed of a number of significant issues involving the rules of evidence in conspiracy cases, the examination of hostile witnesses and proper argument to the jury arising out of such examination in a manner wholly inconsistent with settled precedent in this Circuit. Because of the need for the District Judges and prosecutors in this Circuit to know what rule of law to follow on these frequently recurring issues, because, we respectfully submit, the opinion is for the most part unsound, and because the opinion creates a series of technical restrictions, both unnecessary and contrary to the law of this Circuit, on the admission of evidence, the questioning of witnesses and the Government's summation, we suggest that this appeal warrants consideration by the Court *in banc*.*

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* We are aware, of course, that any request for consideration of a case *in banc* is a heavy imposition on the time of the members of this busy Court. No such application has been made by this Office in well over a year, and we do so here only after the most careful reflection.

ARGUMENT*

POINT I

There was no error of substance in the prosecutor's questioning of the hostile Government witness Hector Ortiz.

Indictment 72 Cr. 391, filed April 7, 1972, charged Torres in Count One with conspiring with Jose Sanjurjo, Jesus Sanjurjo and Hector Ortez (sic) to distribute narcotics during the period December 1, 1971 to April 7, 1972.** Jesus Sanjurjo was convicted after a jury trial in the United States District Court for the Southern District of New York before the Honorable Inzer B. Wyatt, United States District Judge, in September, 1972. In early 1974, Jose Sanjurjo and Wilson Torres were apprehended in Puerto Rico and removed to the Southern District of New York, and Hector Ortiz was arrested in New York City. On March 21, 1974 Jose Sanjurjo pleaded guilty to Count One, and the following day Ortiz pleaded guilty to Counts One and Two.

On March 25, 1974, Torres' trial commenced, and after Detective Guzman, the principal Government witness, had testified, Ortiz was called to the stand out of the presence of the jury to determine whether he would testify if called as a witness by the Government. *United States* v. *Sanchez*, 459 F.2d 100, 103 (2d Cir.), *cert. denied*, 409 U.S. 864 (1972). Ortiz admitted that he was a defendant named in the indictment and that he had pleaded guilty to both counts in it, but, when asked if he and Jose Sanjurjo had distributed heroin on January 18, 1972, as charged in

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* The facts of the case are fully set forth in the Court's opinion and the Government's brief.

** The second count, which named Ortiz and Jose Sanjurjo, charged the distribution of about 30 grams of heroin on January 18, 1972.

Count Two, he said, "I don't remember. I know I was using drugs at that time" (Tr. 129-130). After consulting with his attorney and being threatened with contempt by the Court, Ortiz admitted the January 18 sale (Tr. 130-132). He was asked if he knew "a man named Wilson Torres" and responded, "I know many Wilson Torres." He then denied knowing the defendant Wilson Torres. Further exploration of his testimony was cut off by an objection by Torres' counsel, and Judge Wyatt ruled that Ortiz could be called before the jury by the Government and treated as a hostile witness (Tr. 133-135).

Still later Ortiz was called before the jury. He was asked about the January 18 narcotics sale and admitted his and Jose Sanjurjo's participation in it (Tr. 162). He also admitted that the purchaser on that occasion (Detective Guzman) had returned about a month later and had spoken with Jesus Sanjurjo and later with him about purchasing more heroin (Tr. 163). Ortiz was then asked who was to deliver the heroin on the second occasion and claimed he did not know (Tr. 163). The prosecutor then inquired if Ortiz had previously told federal agents in the presence of his attorney that Torres was to deliver the heroin, and Ortiz denied that he had. Ortiz was then asked if he had told the agents that Torres worked for Jose Sanjurjo, and Ortiz responded, "Yes, that is true" (Tr. 163-164). The prosecutor then asked whether Ortiz had said to the agents that "the work that Mr. Wilson Torres did for Mr. Sanjurjo was to deliver heroin" and "that it was part of Mr. Torres' work in delivering the heroin to make trips back and forth to Puerto Rico". Ortiz denied having said so (Tr. 165-166). Ortiz then denied that he had testified that Torres worked for Sanjurjo. Finally, Ortiz claimed to know Torres "only by sight" and that he "saw" him in December, 1973. When asked if he had seen him prior to that time, Ortiz responded "Maybe" (Tr. 167-168). The examination then concluded.

This Court found error in the prosecutor's question about Torres' acting as a narcotics courier for Jose Sanjurjo apparently on two grounds: (1) that evidence that Torres had so acted at some undisclosed time was inadmissible to prove the conspiracy charged, and (2) that the question was impermissible impeachment in any event. Slip op. at 5626-5627.* The Government respectfully submits that both grounds are erroneous.

As to the first ground, it is, of course, true that the prosecutor's question did not fix the time when Torres acted as Jose Sanjurjo's narcotics courier. But such evidence would have been admissible irrespective of when Torres acted as Jose Sanjurjo's narcotics courier. Evidence that Torres had acted as a narcotics courier for Jose Sanjurjo during the conspiratorial period alleged in the indictment—December, 1971 to April, 1972—would have been admissible as proof of the most direct kind of the offense charged, a conspiracy between Jose Sanjurjo, Torres and others to distribute narcotics. *United States* v. *Bynum*, 485 F.2d 490, 498 (2d Cir. 1973), *vacated on other grounds*, — U.S. —, 42 U.S.L.W. 3625 (May 28, 1974); *United States* v. *Persico*, 425 F.2d 1375, 1384 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); *United States* v. *Light*, 394 F.2d 908, 912-913 (2d Cir. 1968).** Evidence that Torres had

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* There is no suggestion in the Court's opinion, and properly so, that the prosecutor lacked a good faith basis for the questions about Ortiz' prior statements. *E.g.*, *United States* v. *Pacelli*, 491 F.2d 1108, 1120 (2d Cir.), *cert. denied*, —— U.S. ——, 43 U.S.L.W. 3208 (October 15, 1974). Such a good faith basis was specifically conceded by Torres' counsel at oral argument of the appeal.

** The Court intimates that, if the Government wished to prove that Torres had acted as a courier for Jose Sanjurjo, the indictment should have charged it as an overt act. The Court also suggests that proof of Torres' activities as a narcotics courier on other occasions would not have established that he was to be the courier on February 14. These remarks appear to be premised on

[Footnote continued on following page]

acted as a courier for Jose Sanjurjo prior to the conspiratorial period charged would nevertheless have been "relevant to prove that [Torres and Sanjurjo] could well have been continuing along the same line." *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *United States* v. *Bonanno*, 467 F.2d 14, 17 (9th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973). Moreover, the same evidence would have been admissible to prove the existence and purpose of the conspiracy. *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3231 (October 21, 1974); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *Costello*, 352 F.2d 848, 854 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 201 (1968). Similarly, proof that Torres had acted as a courier for Sanjurjo after the period of the conspiracy charged would have been admissible to prove the existence of the conspiracy and Torres' participation in it. *E.g.*, *Anderson* v. *United States*, — U.S. —, 42 U.S.L.W. 4815, 4818 (June 3, 1974); *United States* v. *Super*, 492 F.2d 319, 323 (2d Cir. 1974); *United States* v. *Nathan*, 476 F.2d 456, 459-460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973). Finally, Torres' activities as a courier for Sanjurjo, whenever they occurred, were admissible on the wholly independent ground that they tended to establish Torres' knowledge and criminal intent. *United States* v. *Mallah*, Dkt. No. 74-1327 (2d Cir., September 23, 1974), slip op. at 5488-5489; *United States* v. *Cohen*, *supra*; *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir.), *cert. denied*, 414 U.S. 851 (1973); *United States* v. *Diorio*,

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the wholly erroneous view that the charge against Torres was that he was a narcotics courier, or that he was a courier on February 14. To the contrary, the offense charged was a conspiracy to sell narcotics over a four month period among Torres, the Sanjurjos and others. *Cf. United States* v. *Floyd*, 496 F.2d 982, 987 (2d Cir. 1974). While the proof concerned three occasions on the streets of upper Manhattan, nothing in the indictment defined the conspiracy in so limited a manner.

451 F.2d 21, 23 (2d Cir. 1971), *cert. denied,* 405 U.S. 955 (1972).*

The Court's other ground, based on *United States* v. *Cunningham,* 446 F.2d 194, 197 (2d Cir.), *cert. denied,* 404 U.S. 950 (1971), is that the prosecutor's question went beyond ". . . cancellation of the adverse answer as to whether Torres was to deliver the heroin . . ." on February 14. Slip op. at 5626-5627. This reliance on *Cunningham* is entirely misplaced. What underlay the quoted statement by Chief Judge Friendly in *Cunningham* was the Government's attempt to prove through the testimony of an agent a prior unsworn statement of a hostile witness who had claimed a failure of recollection on the witness stand, not, as here, the confronting of a hostile witness with his prior inconsistent statement, the latter a procedure permissible regardless of the harm done by the witness' testimony, *United States* v. *Murray,* 297 F.2d 812, 816-817 (2d Cir.), *cert. denied,* 369 U.S. 828 (1962), and one which was expressly sanctioned by Chief Judge Friendly elsewhere in *Cunningham,* 446 F.2d at 197, without objection from Judge Oakes in dissent. While here, to be sure, the prosecutor failed to elicit the witness' forgetfulness or denials of Torres' courier activities with appropriate preliminary

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* The Court also intimates that the prosecutor's question was improper because it might have elicited hearsay. The strong probabilities are that Ortiz either had first-hand knowledge of Torres' activities or that he had been told of them by one of the other members of the conspiracy in furtherance of it. As the Court noted, slip op. at 5626 n. 3, such co-conspirators' statements would have been admissible once Torres was shown to be a member of the conspiracy, as he plainly was by the earlier testimony of Detective Guzman, which the Court found sufficient to support the conviction. Slip op. at 5622-5625. In any event, whether or not the prosecutor's question might have elicited inadmissible hearsay evidence, the fact is that it did not, for Ortiz denied making the statement.

There is the further hearsay point, alluded to at slip op. 5627 n. 4, that Ortiz' prior statement was not affirmative evidence

[Footnote continued on following page]

questions, he was laboring under very difficult conditions.* Further, it can hardly be supposed, in view of his testimony up to that point, that Ortiz would have responded with anything other than denials, ignorance or forgetfulness if the proper preliminary questions had been put.**

Moreover, before Ortiz was off the witness stand, he gave damaging testimony which went far beyond his claim of ignorance of who was to deliver the heroin on February 14 and which would have fully warranted even independent proof of his prior statement about Torres' narcotics courier activities under the principle quoted from *Cunningham* by the Court. The Government's principal witness, Detective Guzman, testified to the participation of Ortiz, Torres and Ortiz' wife Lillian in the aborted sale on February 14. Ortiz himself testified to his substantial involvement with the Sanjurjos (Tr. 162-164). But Ortiz testified that he knew Torres only by sight and implied that he had never even laid eyes on him until December, 1973 (Tr. 167-168), more than a year and a half after the events Guzman described. This testimony by Ortiz went far beyond his "adverse answer as to whether Torres was to deliver the heroin" on February 14, slip op. at 5627, and significantly

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of guilt, *United States* v. *Briggs*, 457 F.2d 908, 910 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972), unless Ortiz affirmed its truthfulness on the witness stand, *United States* v. *Klein*, 488 F.2d 481, 483 (2d Cir. 1973). Here, of course, Ortiz' denials of his prior statement made further laying of such a foundation impossible.

* Judge Wyatt stated at the side bar that he believed Ortiz was "perjuring himself" (Tr. 170) and also characterized the scene in the courtroom during the examination of Ortiz as follows: "Mr. Cutner [the prosecutor], this is getting into an absolutely chaotic condition. The interpreter is interpreting, you are asking the question and Mr. Naftalis [defense counsel] is shouting" (Tr. 165).

** Had Ortiz' answers been otherwise, the result would, of course, have been far more detrimental to Torres.

controverted the Government's entire case. The prior statement of Ortiz concerning Torres' narcotics courier activities for Jose Sanjurjo substantially contradicted Ortiz' damaging testimony concerning his casual and recent acquaintance with Torres and, at a minimum, was properly used to cross-examine Ortiz. And while, as a technical matter, the prior statement was used before this damaging testimony came out, it is settled law that the order of the proof and the adequacy of a foundation are matters for a trial judge's discretion, *Begley* v. *Ford Motor Company*, 476 F.2d 1276, 1279-1280 and n. 5 (2d Cir. 1973), that the adequacy of a foundation turns on the whole record, *Orser* v. *United States*, 362 F.2d 580 (5th Cir. 1966), *United States* v. *Rooth*, 159 F.2d 659 (2d Cir. 1947), and that evidentiary deficiencies, even of constitutional magnitude, are, in contexts like this, cured by subsequent supplementation at trial, *e.g. Nelson* v. *O'Neill*, 402 U.S. 622 (1971); *United States* v. *Wenger*, 455 F.2d 308, 310 (2d Cir.), *cert. denied*, 407 U.S. 920 (1971).

POINT II

The appearance as a witness by Assistant United States Attorney Hemley was not reversible error.

The second basis upon which this Court found error is that Assistant United States Attorney Hemley, who was sitting at counsel table advising Assistant United States Attorney Cutner, then trying his second case, was permitted to take the stand and testify that he had seen Ortiz and Torres embrace and converse for five minutes in the courtroom the day before. Hemley did nothing before the jury but sit at counsel table and go to the side bar; he neither opened nor summed up, examined witnesses or interposed objections.

The Court's first ground for finding Hemley's testimony inadmissible is that "[n]o foundation had been laid for

this impeachment because Ortiz had never been questioned about this incident." Slip op. at 5627.* No such foundation was required. Even if Ortiz had never taken the stand, evidence of the affectionate greeting and conversation would have been independently admissible as substantive circumstantial evidence of the conspiracy by showing a close personal relationship between two persons the Government claimed were co-conspirators. *United States* v. *Diggs*, 497 F.2d 391, 394 (2d Cir. 1974); *United States* v. *Garelle*, 438 F.2d 366, 368-370 (2d Cir. 1970), *cert. dismissed*, 401 U.S. 967 (1971); *cf. United States* v. *Nathan*, *supra*, 476 F.2d at 460. Second, even if the admissibility of Hemley's testimony had been limited to impeachment of Ortiz' testimony, it is settled in this Circuit that conduct of a witness tending to suggest bias, as opposed to his statements, may be proved extrinsically without first confronting the witness with the conduct. *Comer* v. *Pennsylvania Railroad Co.*, 323 F.2d 863 (2d Cir. 1963). *Accord*, IIIA Wigmore, Evidence § 953 (Chadbourne rev. 1970), at 800, 802.

The Court's second basis for finding Hemley's testimony impermissible is that his participation in the trial was sufficient to preclude his appearing as a witness without a showing that no one else was available to give the testimony required. The Government does not dispute this proposition.** We do, however, urge upon the Court that

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* This statement is taken *verbatim* from Torres' brief (at 14), where it was not surprisingly unadorned by any citation of authority.

** The narrow scope of this rule is highlighted by the fact that there would have been no impropriety in calling Hemley, despite his presence at counsel table, had he been an attorney employed by an Executive department other than the Department of Justice. *United States* v. *Zane*, 495 F.2d 683, 694 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3239 (October 21, 1974).

the calling of Hemley was not done, as the Court's opinion suggests, slip op. at 5628, cavalierly and in the teeth of admonitions by the trial judge. Assistant Untied States Attorney Cutner said: "I am aware that the preferred practice in this Circuit is not to call assistants if that can be avoided. It is the Government's position, your Honor, that in this instance it can't be avoided" (Tr. 159). Judge Wyatt himself said: "I do not see anything irregular or improper about it" (Tr. 158) and allowed Hemley to testify.

Moreover, we submit that the fact that Hemley testified does not warrant reversal on this record. First of all, while admittedly the Government did not establish that no one other than Hemley could have furnished the needed testimony, nothing in the record establishes that there was in fact someone other than Hemley who had witnessed and remembered the incident. Second, Hemley's testimony was exceedingly brief, filling just half a page in the transcript. Third, Hemley's testimony was not controverted in any way, so that it can hardly be said that his credibility was put in issue. Fourth, Hemley's testimony, while relevant and probative, was hardly of substantial importance to the issues being tried. Fifth, Hemley did not participate in the trial except to the extent of sitting at counsel table. Sixth, Hemley did not participate in the trial, even to this limited extent, with the foreknowledge that he might be called as a witness.

The foregoing distinguishes this case from *United States* v. *Alu*, 246 F.2d 29 (2d Cir. 1957) and *United States* v. *Pepe*, 247 F.2d 838 (2d Cir. 1957), on which the Court relied, and from the more recent *Backo* v. *Local 281, United Brotherhood of Carpenters & Joiners*, 438 F.2d 176, 179-180 (2d Cir. 1970), *cert. denied*, 404 U.S. 858 (1971). In *Alu*, the conviction was affirmed despite the fact that an Assistant United States Attorney who examined witnesses

at trial had testified about a matter which this Court found could have been easily established through a different witness. Moreover, in *Alu*, as in *Backo*, it seems clear that the attorney who also acted as a witness had every reason to know before the proceeding commenced that he would appear as a witness and thus could have avoided acting as trial counsel for one of the litigants. In *Pepe*, the conviction was reversed but not merely on the ground that an Assistant United States Attorney testified. There the Assistant United States Attorney, trying the case himself, gave testimony on a highly significant and controverted issue; moreover, the Court found that the prosecutor must have known that his testimony would be insufficient for the purpose for which it was offered.

Finally, there is no showing here that Torres was prejudiced by the fact that Hemley testified. Had he thought that there was any real possibility of prejudice, experienced defense counsel would no doubt have asked that Hemley be required to cease his participation as counsel at the trial once he testified. *United States* v. *Fiorillo*, 376 F.2d 180, 185 (2d Cir. 1967). Defense counsel did not do so. Moreover, this Court's suggestion that a court clerk or court reporter should have been called in Hemley's stead, slip op. at 5627, seems a strange one,* since the calling of court personnel who had participated in the trial would have had a more prejudicial impact than the calling of an attorney clearly allied with the prosecution.

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* The same cannot be said about the calling of a marshal, which the Court also suggested.

POINT III

There was no impropriety in the prosecutor's summation.

The final ground upon which the Court's reversal rests is that the prosecutor committed error "by arguing from Hemley's testimony that Ortiz did not want to tell the jury that Torres 'was the guy who sold heroin.' In so doing the prosecutor created an implication that the impeachment testimony was affirmative evidence despite the judge's prior limiting instruction." Slip op. at 5628. This holding, we submit, is wholly at variance with the record. The prosecutor simply did not argue that the jury should use Ortiz' denials as evidence of Torres' guilt. Compare *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (2d Cir.), *cert. denied*, — U.S. —, 43 U.S.L.W. 3212 (October 15, 1974).* The evidence that Torres "'was the guy who sold heroin'" came not from "implications" about Ortiz' denials or the prosecutor's questions of him but rather from the testimony of Guzman. The identical argument could have been made even if Ortiz' prior inconsistent statement had never been mentioned. However, even if the prosecutor had asked the jury to draw "'. . . the opposite conclusions from what Mr. Ortiz testified to . . .'", slip op. at 5628, it seems clear that such

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* *Dioguardi* and *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970), upon which *Dioguardi* relies, establish that, even where constitutional protections are involved, this Court will not strain to find an improper implication in a prosecutor's remarks unless the impropriety was either "'manifestly intended'" or the jury would "'naturally and necessarily'" draw the impermissible inference from what the prosecutor said. *United States ex rel. Leak* v. *Follette, supra*, 418 F.2d at 1269. We submit that "the implication" this Court found that the prosecutor "created" in this case simply does not exist, especially if his summation is analyzed under this settled test.

an argument would have invited the jury to do no more than Judge Learned Hand, in identical circumstances, held that they might. *United States* v. *Allied Stevedoring Corp.*, 241 F.2d 925, 932-933 (2d Cir.), *cert. denied*, 353 U.S. 984 (1957). See also *United States* v. *Alu*, *supra*, 247 F.2d at 844. *Cf. United States* v. *Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974).

CONCLUSION

The opinion of the Panel should be vacated, and the judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JOHN D. GORDAN, III,
Assistant United States Attorney, Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

JOHN D. GORDAN III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of November, 1974 he served ~~xxcopy~~ 2 copies of the within Petition for Rehearing by placing the same in a properly postpaid franked envelope addressed:

GARY P. NAFTALIS, ESQ.
One Rockefeller Plaza
New York, N. Y. 10020

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

6th day of November, 1974

Lawrence S. Feld

LAWRENCE S. FELD
Notary Public, State of New York
No. 31-0244552
Qualified in New York County
Commission Expires March 30, 1976